

**DEPARTMENT OF STATE REVENUE**

LETTER OF FINDINGS NUMBER: 00-0010  
SALES AND USE TAX  
FOR TAX PERIODS: 1996-1997

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**Issues**

**1. Sales and Use Tax: Riverboat Casino**

**Authority:** IC 6-2.5-3-2(a), IC 6.1-1-15, 45 IAC 2.2-3-6 (a), IC 6-2.5-5-27.

The taxpayer protests the imposition of tax on its riverboat casino.

**2. Sales and Use Tax: Credits**

**Authority:** IC 6-2.5-3-2.

The taxpayer protests assessments on certain items.

**3. Sales and Use Tax: Gaming Equipment**

**Authority:** IC 6-2.5-1 (b).

The taxpayer protests the assessment of tax on gaming equipment.

**4. Sales and Use Tax: Kitchen Equipment**

**Authority:** IC 6-2.5-5-3, Sales Tax Information Bulletin #11, Revised May, 1994.

The taxpayer protests the assessment of tax on kitchen equipment.

**5. Tax Administration: Negligence Penalty**

**Authority:** IC 6-8.1-10-2.1, 45 IAC 15-11-2 (b).

The taxpayer protests the imposition of tax on materials used in improvements to the taxpayer's gaming vessel.

### **Statement of Facts**

The taxpayer operates a casino riverboat. After an audit, the taxpayer was assessed additional use tax, interest and penalty. The taxpayer protested the assessment and a hearing was held.

#### **1. Sales and Use Tax: Riverboat Casino**

Pursuant to IC 6-2.5-3-2(a), Indiana imposes an excise tax on tangible personal property stored, used, or consumed in Indiana. In 1996 the taxpayer purchased a new gaming vessel which was constructed in Florida and delivered to Indiana. The taxpayer self-assessed use tax on \$25,779,715. However, the total cost of the gaming vessel was \$33,879,715. The audit assessed use tax on the difference of \$8,100,000. The taxpayer protested this assessment and claimed a refund of the use tax previously paid. Only the protest of the assessment will be addressed in this Letter of Findings.

The taxpayer protests the assessment claiming that the riverboat casino is actually real estate and therefore not subject to the use tax which is only imposed on tangible personal property. The taxpayer bases its contention on the definition of real property found in the law governing the Indiana property tax, IC 6.1-1-15 as follows:

“Real Property” means:

- (1) land located within this state;
- (2) a building or fixture situated on land located within this state;
- (3) an appurtenance to land located within this state;
- (4) an estate in land located within this state, or an estate, right, or privilege in mines located on or minerals, including but not limited to oil or gas, located in the land, if the estate, right, or privilege is distinct from the ownership of the surface of the land; and
- (5) notwithstanding IC 6-6-6-7, a riverboat licensed under the provisions of IC 4-33 for which the state board of tax commissioners shall prescribe standards to be used by township assessors.

The first four items in the property tax definition of real property are the commonly understood definitions of real property. The last item concerning the classification of riverboats such as the taxpayer's riverboat was added in 1995 to specifically denominate riverboat casinos as real property for purposes of the tax on real property. The fact that the legislature considered it necessary to specifically classify riverboats as real property for purposes of property tax when all other property in the state is classified pursuant to the first four items indicates that the classification is counterintuitive to the generally held understanding of a riverboat as tangible personal

property. Although the Department may look to the classification of property for property tax purposes to assist in determining whether difficult to classify property is tangible personal property for sales tax purposes, it is not required to do so.

The issue to be determined is whether the taxpayer's gaming vessel is tangible personal property for sales and use tax purposes. "Tangible" is defined as "discernable by the touch or capable of being touched" in Webster's II New Riverside University Dictionary, The Riverside Publishing Company, 1988 at page 1182. The same dictionary at page 877 defines "personal property" as "temporary or movable property as distinguished real property." A gaming vessel is movable property that can be touched. The boat actually has a pilot and life preservers for travel in the water. It operates under authority of the U.S. Department of Transportation. It is not permanently attached to the land. Generally, then, the taxpayer's riverboat casino would be considered tangible personal property.

The Sales and Use Tax Regulations do not give a definition of tangible personal property for sales and use tax purposes. They do, however, refer to boats and watercraft as subject to the sales and use tax. 45 IAC 2.2-3-6 (a)( 2) defines "watercraft" as

a contrivance used or designed for navigation on water, including a vessel, boat, motor vessel, steam vessel, sailboat, vessel operated by machinery either permanently or temporarily affixed, scow, tugboat or any marine equipment that is capable of carrying passengers, except a ferry.

The taxpayer's riverboat casino clearly falls within the sales and use tax regulatory definition of "watercraft." 45 IAC 2.2-3-6(c)(2) specifically imposes use tax on Indiana watercraft purchased out of state. By these standards, the taxpayer's riverboat casino is tangible personal property and subject to the sales and use tax. Since there is a specific definition and imposition of sales and use tax on boats in the Sales and Use Tax Regulations, the Indiana Department of Revenue does not need to look to the property tax statute for assistance in classification of the gaming vessel as tangible personal property subject to the sales and use tax.

Alternatively, the taxpayer contends that if the Department finds that its gaming vessel is tangible personal property and qualifies for imposition of the sales and use taxes, then that gaming vessel qualifies for the public transportation exemption found at IC 6-2.5-5-27 as follows:

Transactions involving tangible personal property and services are exempt from the state gross retail tax, if the person acquiring the property or service directly uses or consumes it in providing public transportation for persons or property.

To bolster its argument that the riverboat casino qualifies for the provision of public transportation exemption, the taxpayer offers evidence that the vessel's operation is regulated by the U.S. Department of Transportation and that those regulations are enforced by the U.S. Coast Guard.

The only purpose of the taxpayer's gaming vessel is the provision of an opportunity for people to gamble legally. Persons seeking transportation in the state of Indiana do not consider the taxpayer's services. The previously cited sales and use tax regulation specifically states that a ferry would not be subject to the imposition of tax. The taxpayer's boat can not be considered a ferry in that it doesn't transport anyone from one point to another point. At most the boat moves people in Indiana waters so that they can gamble legally. The taxpayer's riverboat casino does not qualify for the public transportation exemption from the sales and use tax.

### **Finding**

The taxpayer's first point of protest is denied.

## **2. Sales and Use Tax: Credits**

### **Discussion**

The use tax is imposed on an Indiana use of tangible personal property purchased in a retail transaction. IC 6-2.5-3-2. The taxpayer and the Indiana Department of Revenue are in agreement that tax on the use of the purchased items is due to the state. The tax should only, however, be imposed once on each item of property purchased in a retail transaction.

The taxpayer executed a voluntary disclosure agreement under which the taxpayer agreed to remit outstanding use tax related to its 1996 pre-opening expenses made prior to June 1, 1996. The taxpayer contends that the audit did not give it credit for the \$139,747.00 remitted with the 1996 IT-20. While it is true that the auditor did not give credit for taxes paid on the IT-20 return, the auditor also did not include those total taxable purchases in the audit. The auditor only assessed tax on additional purchases on which the sales tax was not paid by the taxpayer.

The taxpayer also contends that three purchases were listed twice in the audit. The taxpayer requests that one listing of each of the three purchases should be offset against the audit assessment.

### **Finding**

The taxpayer's protest concerning the credit for taxes paid on the IT-20 return is denied.

The taxpayer's protest concerning the purchases that were listed twice in the audit is sustained subject to audit verification.

### **3. Sales and Use Tax: Gaming Equipment**

#### **Discussion**

The taxpayer agrees that gross retail tax is due to the state on these items of gaming equipment. The taxpayer contends, however, that it has already paid the tax to the vendor as agent of the state. The law provides for the payment of gross retail tax at IC 6-2.5-2-1 (b) as follows:

The person who acquires property in a retail transaction is liable for the tax on the transaction and, except as otherwise provided in this chapter, shall pay the tax to the retail merchant as a separate added amount to the consideration in the transaction. The retail merchant shall collect the tax as agent for the state.

The taxpayer provided a copy of the contract indicating that the total price of the gaming equipment included sales tax and a copy of a letter indicating the payments made. The Indiana Department of Revenue records indicate that the vendor was registered as a retail merchant with the Indiana Department of Revenue during the tax period and that the vendor actually remitted sales tax during that period to the state.

#### **Finding**

The taxpayer's protest is sustained.

### **4. Sales and Use Tax: Kitchen Equipment**

#### **Discussion**

The taxpayer purchased kitchen equipment for the bars and restaurants on its riverboat. The taxpayer self assessed use tax on some of the equipment. In the audit, the Indiana Department of Revenue assessed use tax on several other pieces of equipment. The taxpayer protests a portion of these assessments.

Pursuant to IC 6-2.5-5-3, tangible personal property which is purchased "for direct use in the direct production. . . of other tangible personal property" qualifies for exemption from the use tax. Sales Tax Information Bulletin #11, revised May, 1994, clarifies the application of the manufacturing exemption to kitchen equipment in a bar or restaurant as follows:

The purchase of tangible personal property that will act directly on the food during preparation are exempt from the sales tax. (For example, a

fryer or broiler would be exempt. However, a refrigerator is taxable because it serves merely as an agent in the preservation of food and does not act directly on the food during preparation. [)]

The taxpayer protests the assessment of tax on a microwave oven and a hot dog bun warmer. These two items merely keep food warm and do not act directly on the food during preparation. Therefore, they do not qualify for the exemption.

The taxpayer protests the assessment of tax on an iced tea brewer, a coffee brewer, two hot dog grills and a four-slice toaster. These items of kitchen equipment act directly on the food during preparation by cooking it. Therefore, these pieces of equipment qualify for the exemption.

Finally, the taxpayer protests the assessment of tax on two ice machines. These machines act directly on water to freeze it into ice cubes. These machines qualify for exemption.

### **Finding**

The taxpayer's protest is sustained in part and denied in part.

## **5. Tax Administration: Negligence Penalty**

### **Discussion**

Taxpayer's final point of protest concerns the imposition of the ten per cent negligence penalty pursuant to IC 6-8.1-10-2.1. Indiana Regulation 45 IAC 15-11-2 (b) clarifies the standard for the imposition of the negligence penalty as follows:

"Negligence", on behalf of a taxpayer is defined as the failure to use such reasonable care, caution, or diligence as would be expected of an ordinary reasonable taxpayer. Negligence would result from a taxpayer's carelessness, thoughtlessness, disregard or inattention to duties placed upon the taxpayer by the Indiana Code or department regulations. Ignorance of the listed tax laws, rules and/or regulations is treated as negligence. Further, failure to read and follow instructions provided by the department is treated as negligence.

The audit assessed use tax on purchases in addition to those under protest. For example, the taxpayer failed to pay retail sales tax or remit use tax on many items clearly subject to the use tax such as umbrellas, business cards, greeting cards, housekeeping supplies and Indiana flags. The taxpayer's actions meet the requisite negligence standard.

**Finding**

The taxpayer's final point of protest is denied.

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